OUGHT THE UNITED STATES SENATE TO BE REFORMED?

NEARLY a year ago I read in *The Open Court* (December 28, 1893) a small note that raised large hopes. I understood it as a promise from Professor von Holst that he would soon deal "at full length" with the criticisms of General Trumbull on the United States Senate. At last, I thought, we shall have a competent treatment of the gravest constitutional problem from a cosmopolitan publicist, one not liable to our hereditary political provincialism, which can only answer, "Great is Constitutio of the Americans!" Anticipating fulfilment of this hope, I eagerly perused the Professor's contribution in *The Monist* (October, 1894). One would not usually look for criticisms of organic law in a Fourth-of-July oration: on that day the eagle is not apt to be punctured by a pen from its own spread wing; yet here, too, the Professor promises "later on" a "serious examination" of the question raised by myself and others concerning the Senate. The "later on" seemed to refer to a further part of the oration, but I must have misunderstood it. The Professor devotes himself to the bicameral system; but the question is not whether the bicameral system is good, but whether a particular form of it, unknown to any State or nation except our federal Union, is defensible. No one knows better than von Holst that the great statesmen of the Constitutional Convention of 1787 regarded the unequal representation established in the Senate as an outrage on the bicameral system, and that the men who chiefly forced it on them with menaces admitted its unfairness in principle. Does the Professor regard the protests of Franklin,

Hamilton, Wilson, Mason, Randolph, Morris, Madison, as wrong or right? I search his oration in vain for an answer. At one point he starts out bravely, as if about to meet the question, but the outcome resembles Emerson's description of a far-western road, which, beginning as a fine avenue, changed to a squirrel-track, and ran up a tree. The Professor's tree is Bicameralism; his oratorical avenues all lead to it; but I do not propose to follow him thither, although he has tried to draw me on that trail. Criticising my contention in *The Open Court* (March 15, 1894), that "the entire abolition of the Senate does not come within the range of practical politics," he says: "Irrespective of what the chances of success during his life-time might be, he owes to himself, as a good patriot, to exert himself to the utmost to have this vicious receptacle of 'American snobbery' razed to the ground." But I have a preference for evolutionary methods of reform, and have a right, since he makes me a clothes-horse for his rhetoric, to remind him that, the Fourth of July being over, we await his "serious examination of the question, whether he, and those who more or less agree with him, are right in asserting that the Senate is a pernicious incubus fastened upon the republic by the short-sightedness, the narrow prejudices, and the self-seeking provincialism of the authors of the Constitution." These are the Professor's words, not mine; I should substitute for the last five words, "some members of the Convention"; but I will not stop to quarrel about the phraseology, if the Professor will bear in mind that it is no answer to an argument to travesty its conclusions, and will frankly meet the issue.

It is with a genuine expectation that he will do so that I propose to restate the matter more fully, both historically and in connexion with recent events. But before doing so I am compelled to make a few reclamations. In my paper on Senatorial Reform I said:

"The Constitution of 1787 was really a treaty between thirteen sovereigns, the smaller empires refusing to unite unless their inherited supremacies were secured the power to overrule the voice of the nation. This was the real foundation of the Senate. But in the discussions of the Convention (1787) that doctrine of sovereignty, *discredited even in England*, was veiled, though the veil was as discreditable

as the motive concealed. The necessity being first of all to get the second Legislature established in the Constitution, it was done with an innocent air, and without discussion, on the mere statement that England had two Houses, and that two Houses had always proved favorable to liberty."

This the Professor quotes (omitting, curiously, the four words italicised) and on the score of that "veil" accuses me of "historical color-blindness." "There was nothing whatever 'veiled' about this question in the Convention," he says, and goes on into a page of quotations concerning the division of the Legislature into two branches. But I do not say the scheme of two branches was veiled. It was the discredited doctrine of State sovereignty, and the intention to force it into the second chamber, which were veiled. Where is the color-blindness? It is in the Professor seeing a plain veil as a red rag, rushing at it, but in another part of his oration confirming my history. He says: "To make the Senate besides a representation of Statehood was altogether an afterthought," and "so far as we can learn from the exact sources, the thought of making the Senate a representation of the States as such was at first not entertained by a single member." I am surprised that Professor von Holst can suppose that the members from the small States could have threatened to break up the Union upon an afterthought, a point on which they had brought no instructions. However, my statement is not merely inferential; there are "exact sources" of information, among them the following Note by Madison on the New Jersey plan, introduced in the Convention June 15, 1787, which proposed only one House, and that constituted like the present Senate, except that this body, elected by the State Legislatures, was also to elect the Federal Executive! Madison says:

"This plan had been concerted among the Deputations, or members thereof, from Connecticut, New York [then opposing Hamilton's efforts for a National Government], New Jersey, Delaware, and perhaps Mr. Martin from Maryland, who made with them a common cause, though on different principles. . . . The States of New Jersey and Delaware were opposed to a National Government, because its patrons considered a proportional representation of the States as the basis of it. The eagerness displayed by the members opposed to a National Government began now to produce serious anxiety for the result of the Convention. Mr. Dickinson [Delaware] said to Mr. Madison: 'You see the consequence of pushing things too far.

Some of the members from the small States wish for two branches of the General Legislature, and are friends to a good National Government; but we would sooner submit to a foreign power, than submit to be deprived, in both branches of the Legislature, of an equality of suffrage, and thereby be thrown under the dominion of the larger States.'" (*Madison Papers*, ed. 1840, Vol. II, p. 862.)

John Dickinson, who had refused to sign the Declaration of Independence, partook of the smallness of the State he represented (Delaware), but was a more large-minded man when he became a Pennsylvanian. He and his fellow small State men had, before that secret communication to Madison, been making speeches in the Convention for some weeks, and their worst intimation had been that, if they were not allowed State-equality, Delaware, and perhaps Connecticut, might withdraw their members from the Convention. These petty "sovereigns" began their terrorism only after the Convention, despite such intimations, had received (June 13) its Committee's Report, assigning proportional representation to both branches. They then asked a day for consultation, and on bringing in their rival scheme (June 15) secretly revealed to Madison their "doctrine of sovereignty," which was to rule or ruin. They had resolved to perpetuate the Confederation, and to strengthen its inequitable feature, and they began by overruling the voice of the Convention. But that menace of a foreign alliance, whispered to Madison on June 15 was still veiled from the Convention for two weeks. It was not until June 30 that the threat was made in the Convention. Hitherto their position had been that their State rights and independence would be at the mercy of the large States. This Dr. Franklin met with a compromise (June 30) "that in all cases or questions wherein the sovereignty of individual States may be affected, or whereby their authority over their own citizens may be diminished, or the authority of the General Government within the several States augmented, each State shall have equal suffrage." Franklin's proposal tore off the veil. It was now revealed that these small States were not acting in self-defence, but resolved, as I said in my *Open Court* article, quoted by von Holst, to secure to their inherited supremacies "the power to overrule the voice of the nation." They scornfully rejected Franklin's compromise, and the

plan stood nakedly what Hamilton declared it, "*a contest for power, not for liberty.*" "There is no middle way between a perfect consolidation, and a mere confederation of States," said Bedford of Delaware, who closed his unpatriotic speech as follows:

"*He was under no apprehensions. The large States dare not dissolve the Confederation. If they do, the small ones will find some foreign ally, of more honor ana good faith, who will take them by the hand, and do them justice.*" (*Madison Papers*, Vol. II, p. 1014.)

Under cover of that pistol the Convention surrendered. I submit that these facts amply support my challenged statement about the veil. And I am reminded by Bedford's speech of another point questioned by Professor von Holst. I stated further, that "when the subject of disproportionate representation in the Senate came before the Convention, it was supported as a principle only on the ground that in the British Parliament small places, with little population, were represented equally with the largest constituencies." Von Holst inserts after my word "only" a note of admiration "(!)." In the speech of Bedford, quoted above, he said: "Look at Great Britain. Is the representation there less unequal? But we shall be told again, that is the rotten part of the Constitution. Have not the boroughs, however, held fast their constitutional rights? And are we to act with greater purity than the rest of mankind?" On June 20 Lansing of New York said, "A great inequality existed in the counties of England. Yet the like complaint of peculiar corruption in the small ones had not been made." Several of the advocates of disproportional representation had (as will be shown hereafter) admitted its unfairness *as a principle*, and if Professor von Holst can find other defences of it, *as such*, in the Debates, except this citation of the now extinct rotten borough system, I shall admit my error. Perhaps I should have added an idiotic remark of Patterson of New Jersey, who compared the large and the small State to the rich and the poor man, who ought to vote equally; the real parallel of his proposal being to make, by legal compulsion, the poor man's penny equal in purchasing power to the rich man's dollar. But von Holst can hardly regard that as an argument.

On another point Professor von Holst bases a charge of histor-

ical inexactness on what is really a misquotation of my paper by himself. To my sentence in the preceding paragraph, challenged by his note of admiration, he appends, with but three intervening dots, the following mutilated quotation from my paper: "Furthermore, besides being 'in the European fashion'. . . it [the Senate] has been as a fashion repeated in all the States." Thereupon he easily accuses me of "the erroneous assumption that the States have " as a fashion repeated" the federal Senate. That (he continues) "is hitching the cart before the horse. It is repeatedly and explicitly stated in the debates of the Convention that it repeated the 'fashion' set by all the States with the exception of Pennsylvania." Now the three dots alluded to "veil" forty lines of my article. Their omission conveys the impression that I was continuing the historical statement, whereas I had left it, and was referring to the fashion prevailing not in the original thirteen, but in our present forty-four States. In the passage which the Professor drags back to the Convention, I am giving reasons why the Senate is not likely to be abolished, but may be reformed:

"The Senate has gradually taken root in American snobbery, it offers a number of lordly offices for eminent office-seekers, and it represents provincial pride. Furthermore, besides being 'in the European fashion' (superficially, for in no other country is there a second chamber so constituted) it has been as a fashion repeated in all the States. Had the substance as well as the form of the national Senate been reproduced in the several States the whole system must have long ago broken down, like the 'rotten borough' anomaly in England."

I acquit Professor von Holst of intentional unfairness, and suspect that he looked through my article less to weigh its words and arguments than to pick materials for a unicameral man-of-straw to be demolished amid fourth-of July plaudits. I do not underrate the Professor's eloquence, but value higher his ability as an investigator of political history. As in our American Revolution the guiding intellects were those of Paine from England and Hamilton from the West Indies, and as the clearest study of our Democracy came from the French De Tocqueville, it is in the line of our traditions that we should receive new light from thinkers trained in countries older in culture and experience. John Stuart Mill once expressed to me his

surprise that there had not arisen in the United States any school of constitutional study and self-criticism. Where can such a school be more appropriately founded than in Chicago, the great western metropolis, where the Proportional Representation League was formed during the World's Fair; and who is more fitted to forward this new departure than von Holst? I cannot feel that he is rightly represented in the implications of the oration before me. That he does not agree with General Trumbull's way of putting it, or with mine, is of little importance compared with the fact that he does not adopt the arguments in favor of disproportionate representation. In the one allusion which seems to favor such uniquely inequitable representation he throws away the argument he had seemed to accept: he cites Pomeroy as affirming that we have in the Senate anchored the principle of local self-government, but presently says this principle would survive the abolition of the Senate. "This principle," says von Holst, "is the vital force not only of Anglican but of Germanic liberty." Exactly. Scotland does not possess less local self-government because it cannot neutralise the vote of England, nor Hesse-Cassel because it cannot balance the voice of Prussia, in those imperial Parliaments. Had von Holst found any argument sustaining the senatorial anomaly would he not have stated it? He recognises the deterioration of the Senate, and is not disinclined to a constitutional amendment that would make it popularly elective. Does he really mean to exclude an amendment which would render it representative of the American people? Edmund Randolph noticed that after the Constitution was ratified there was observable an extreme solicitude to cherish its defects. Whether this was the mother's proverbial favoritism for her deformed child, in the case of the Senate, or the swollen pride of "Prerogative" (Hamilton's label for the power of the small States), that solicitude continues. It survives the tragedies it has cost; it outlives demonstrations of the Senate's worthlessness as a court of impeachment, and repeated proofs that in so small a body the balance of power is easily purchasable; and to-day we find eminent men crying, Reform if you will, and as you please, but leave us—O leave us—the power of Delaware to neutralise the power of New York! I refuse to believe

that this is the voice of von Holst until he says so plainly, and, regarding him as a judicial man, when not engaged with patriotic orations, I submit to him our fair claim that he should deal with the question at issue (which is not Bicameralism but Disproportionate Representation) apart from the shortcomings of this or that writer on the subject. I submit, too, that however necessary it may be on July 4 to describe the Constitution as a "master-work," notwithstanding the many patches which have mended that pre-scientific document, such euphemistic commonplaces are not what we have the right to expect from a public teacher like von Holst. And I further submit the following facts and contentions.

"We may indeed with propriety be said to have reached almost the last stage of national humiliation," are words of Hamilton, cited by von Holst, which represented the feeling of the greatest men in America, and led them to gather in the Convention of 1787. But in that Convention they were confronted by local and sectional interests, of which two were essentially unrepublican, and at the same time strong enough to compel the Convention to establish them in the Constitution. These two were Slavery and State-sovereignty. They were twin barbarisms, and demonstrated to be such by the chief statesmen of the Convention, whom they conquered by selfish and unpatriotic recklessness of consequences, and by their treacherous combination. The blush of the Convention on admitting the barbarisms is visible in its omission of their names. Neither "Slavery" nor "Sovereignty" was considered a word worthy to enter the American Constitution. But by their joint work the blush of the Fathers ultimately became the shed blood of their children. It has required a century of discords and tragedies to repair even in part the disgraceful compromise of our overpraised ancestors with Slavery, whose miserable *sequelæ* survive under the protection of its twin or *pal*—a superstition of State-sovereignty which prevents the national conscience from restraining the savagery of race-hatred, or securing the constitutional rights of its citizens, if a State chooses to deny them; insomuch that it is easier for the Nation to protect an American in Europe than in one of its own States!

The framers of the Constitution did not foresee the gigantic

power that Slavery was to attain; they supposed that it would gradually die out of the South as it was dying out of the North, and that the term assigned to the Slave Trade, 1808, would destroy its root. At any rate, we will give them the credit of so believing. But they made no such mistake in the unrepublican principle which they established in the Senate. No writer can now add anything to their arguments and pleadings against it, except to point to the miserable fruits which have fulfilled the prophecies and justified the indignant protests of the ablest men among them.

"Gouverneur Morris declared proportionate representation 'so fundamental an article in a national government that it could not be dispensed with.' Madison affirmed 'the necessity of providing more effectually for the security of private rights. Interferences with these were evils which had, more perhaps than anything else, produced this Convention. Was it to be supposed that republican liberty could long exist under the abuses of it practised in some of the States?' He declared equality of States in voting 'inadmissible, being evidently unjust.' Brearly, even in a speech advocating such equality, said, 'Is it fair, then, it will be asked, that Georgia should have an equal vote with Virginia? He would not say it was.' Hamilton was 'fully convinced that no amendment of the Confederation, leaving the States in possession of their Sovereignty, could possibly answer the purpose.' 'The members of Congress, being chosen by the States and subject to recall, represent all the local prejudices.' 'As States are a collection of individual men, which ought we to respect most, the rights of the people composing them, or of the artificial beings resulting from the composition? Nothing could be more preposterous or absurd than to sacrifice the former to the latter. It has been said that if the smaller States renounce their *equality*, they renounce at the same time their *liberty*. The truth is, it is a contest for power, not for liberty. Will the men composing the small States be less free than those composing the larger?' 'The State of Delaware, having forty thousand souls, will lose *power* if she has one-tenth only of the votes allowed to Pennsylvania, having four hundred thousand; but will the people of Delaware *be less free*, if each citizen has an equal vote with each citizen of Pennsylvania?' (It was Hamilton who moved 'that the rights of suffrage in the National Legislature ought to be proportioned to the number of free inhabitants,' and 'that the right of suffrage in the second branch ought to be according to the same rule as in the first branch.' Edmund Randolph said, 'The true question is, whether we shall adhere to the federal plan, or introduce the national plan, The insufficiency of the former has been fully displayed by the trial already made.' 'We must resort to a *national legislation over individuals* [italics in Madison's report], for which Congress are unfit.' Dr. Franklin reminded the Convention that the 'method of voting by States was submitted to originally by Congress under a conviction of its

impropriety, inequality, and injustice, and that it was done because in the words of their resolution (September 6, 1774) they were not "at present able to procure materials for ascertaining the importance of each colony."' Mr. Pierce considered the equality of votes under the Confederation as the great source of the public difficulties. 'The members of Congress were advocates for local advantages.' George Mason asked, 'Is it to be thought that the people of America, so watchful over their interests, so jealous of their liberties, will give up their all, will surrender both the sword and the purse to the same body,—and that, too, not chosen immediately by themselves. They never will. They never ought.' Mr. Williamson 'begged that the expected addition of new States from the westward might be taken into view. They would be small States; they would be poor States; they would be unable to pay in proportion to their numbers, their distance from market rendering the produce of their labor less valuable; they would consequently be tempted to combine, for the purpose of laying burdens on commerce and consumption, which would fall with greater weight on the old States.' James Wilson (afterwards Justice of the Supreme Court) said, 'The leading argument of those who contend for equality of votes among the States is, that the States, as such, being equal, and being represented, not as districts of individuals, but in their political and corporate capacities, are entitled to an equality of suffrage. According to this mode of reasoning, the representation of the boroughs in England, which has been allowed on all hands to be the rotten part of the Constitution, is perfectly right and proper. They are, like the States, represented in their corporate capacity; like the States, therefore, they are entitled to equal voices—Old Sarum to as many as London. (The 'rotten borough system' prevailed in Connecticut and one or two other States.) 'The gentleman from Connecticut (Mr. Ellsworth) had pronounced, that if the motion should not be acceded to, of all the States north of Pennsylvania one only would agree to any General Government. . . . If the minority of the people of America refuse to coalesce with the majority on just and proper principles, if a separation must take place, it could never happen on better grounds. The votes of yesterday against the just principle of representation, were as twenty-two to ninety, of the people of America. . . . The question will be, shall less than one-fourth of the United States withdraw themselves from the Union, or shall more than three-fourths renounce the inherent, indisputable, and unalienable rights of men, in favor of the artificial system of States? . . . Such an equality will enable the minority to control, in all cases whatsoever, the sentiment and interests of the majority."

I suppress no arguments on the other side. Towards the close of the debate Wilson declared, "The justice of the general principle of proportional representation has not, in argument at least, been contradicted." Madison repeatedly reminded the leaders of the small States of the same thing. "It was admitted by both the gen-

tlemen from New Jersey," he said, "that it would not be just to allow Virginia, which was sixteen times as large as Delaware, an equal vote only;" and at another time he "entreated the gentlemen representing the small States to renounce a principle which was confessedly unjust; which could never be admitted; and which, if admitted, must infuse mortality into a Constitution which we wished to last forever." The admissions and the confessions were not denied. "Their language was," says Madison, "that it would not be safe for Delaware to allow Virginia sixteen times as many votes." That is, they were not considering the rights of man at all, not the people, but animated by a petty pride of imperial sovereignty which George the Third himself would have abhorred. Let Hamilton's declaration be borne in mind, that these small States were not contending for their own independence, or for the local self-government which Pomeroy and von Holst say is "anchored" in the Senate. Protection for these, more ample than they needed, was offered them in the proposal of Franklin that in all questions affecting State rights or local interests the States should have equal votes. In rejecting that concession they demanded the right of Delaware to balance Pennsylvania *in Pennsylvania's own concerns.* The small States had the giant's power, in their ability to rule or ruin, to refuse union and form alliance with England, which still held the six military posts in this country, and awaited eagerly an opportunity to recover her lost colonies. They thus had the power of a giant, and they used it like a giant. The impressive speech of Wilson (June 30) was replied to by the unpatriotic menace of Bedford, that they would find a foreign ally. Bedford was rebuked by Rufus King and Edmund Randolph, but his arrow had reached its mark, and on July 5 the Convention, fresh from celebration of a festival of human equality, received from its Committee a report in favor of repudiating that equality. Again and again had the just principle been affirmed by the Convention, with majorities representing three-fourths of the people of America, but now began the disgraceful surrender of these to the one-fourth.

And it was the fourth which had shown itself least patriotic. Under the Confederation Rhode Island had not only refused the re-

quisitions of Congress, but it refused to send any representative to the Constitutional Convention in which the other small States were securing for it equal legislative power with New York. New Hampshire was not represented in the Convention until a month and nine days after the day appointed for its session. New Jersey by express act had violated the Federal Articles, by refusing compliance with the requisitions of Congress. Connecticut, ruled by rotten boroughs, had to be bribed with public land to acquiesce in a decree constitutionally awarded against her claim on territory of Pennsylvania; it had also sent to Congress its refusal to comply with its constitutional requisitions. Maryland, whose representative, Luther Martin, spoke (June 27, 28) more than three hours in favor of State sovereignty and equality, had navigation laws which treated citizens of the other States as aliens. Such was the provincial selfishness which coerced, by threats of disunion and foreign alliance, three fourths of the people of America. Even when members enough had surrendered to enable the proposal to pass (July 7) the opponents represented two thirds of the American people. "This fundamental point," said Wilson, "has been carried by one third against two thirds."

It is not necessary to give space to the further struggle for the forlorn hope. It is important to observe that in this case none of the advantages that may be claimed for the power of a minority applied. The minority that founded the Senate were not either in means, culture, or patriotism, equal to the statesmen they subdued. All their brains together would not have made a Franklin or a Hamilton. And the Chamber they founded was provided with no means whatever for securing in it men who would revise with more learning the measures of the representatives, or check their precipitancy. Whether the Senate has served any such purpose is a matter to be dealt with presently; I only make here the historical point that in its origin the Senate represented not only the control of three-fourths of the people by one-fourth, but of the greatest statesmen by their inferiors in every sense. Professor von Holst is quite right in saying that the English House of Lords renders eminent service in compelling Commons and people to give fair chance to "the sober second thought," but the above facts discount his added remark: "Read

the debates of the federal convention and of the ratification conventions and *The Federalist*, and you will soon find out whether this was not one of the most essential functions, nay, pre-eminently *the* function assigned by the fathers of the Constitution to the Senate." So far as debates in the federal Convention are concerned, it is true enough that their proposal of a *second chamber* was to secure the sober second thought, but I would like to know where the Professor finds in those debates any expectation that the *Senate*—that is, after disproportional representation was imported into it—would fulfil such function. And it is from these debates of the Convention, where thoughts were expressed in the freedom of secrecy, that the only clear light can be obtained on the subject. In the State ratification conventions the merits of such questions were subordinated to a choice of evils. The anonymous papers called *The Federalist* represent advocates making out the best case they can for an instrument whose alternative seemed to them national dissolution. In the same spirit all but three of the great men signed a Constitution whose injustice in a fundamental point, and faults in others, they had demonstrated. "The moment this plan goes forth," said Gouverneur Morris, "all other considerations will be laid aside, and the great question will be, shall there be a National Government or not; and this must take place, or general anarchy will be the alternative." Governor Randolph pronounced some features of the Constitution "odious," but he carried Virginia for it. Hamilton said: "No man's ideas were more remote from the plan than his own were known to be; but is it possible to deliberate between anarchy and convulsion on one side, and the chance of good to be expected from the plan on the other?" It was at least a *chance*, and its rejection seemed certain ruin. *The Federalist*, however useful, is a very misleading work if it is not remembered that it was written by Hamilton, Madison, and others, in order to palliate or conceal the faults of the Constitution, in order to secure its ratification, as the only alternative of anarchy. In my opinion, they committed a grievous mistake in all of their concessions. Had the large States, representing three-fourths of the nation, united, as Wilson advised, to form a republic (which this country has never been), the petty sovereignties would

have all come in, like Bo-Peep's sheep, bringing their tails behind them. But it is of no use now to consider what might have been. It is important that the people, in presence of recent senatorial oppressions, should study the history of that anomalous institution, and understand that instead of its being, as Fourth-of-July orations would persuade us, an expression of the wisdom of our patriotic fathers, its vices were recognised by them, its evil fruits foreseen, and it was accepted only as the alternative of the ruin threatened by an unpatriotic and very small minority.

In *The Forum* for November, 1893, an article appeared from the pen of Professor von Holst in which he indignantly arraigned the behavior of the Senate in a recent case, and says: "A clear majority is for the unconditional repeal of the Sherman law, and therefore the correct preamble of any compromise measure should read thus—'Whereas the majority has allowed itself to be bullied by the minority, be it enacted'—." But why should a minority in the Senate not defeat the majority by bullying or any other means? That is the original senatorial rôle. The above history proves that the Senate was born of a bullying minority. Obstruction? Had it not been for obstruction placed by some half dozen men in the Convention in the way of forming any government at all, the Senate, as now constituted, could not have existed. The Convention of 1787 was itself a Senate; and if Professor von Holst is indignant at present senatorial bargains, as between the tariff hucksters and silverites, what has he to say of the bargain that gave slave-owners their fugitive-slave clause and additional representation for their non-voting slaves? Were they specimens of our Founders' wisdom and virtue? In his article in *The Forum* Professor von Holst searches in vain for any authority that can check the power of obstruction in any minority, however small, of the Senate, and his desperate resort to the influence of the press and public opinion is, to my mind, a confession that the evil is organic, without other than organic remedy. He says it is unconstitutional, but of what value is an inferential power for whose application there is no apparatus? Let him ponder the words of the great Justice Wilson in the Convention: "If equality in the second branch were an error that time would correct, I would

be less anxious to exclude it, being sensible that perfection is unattainable in any plan; but being a fundamental error, it ought by all means to be avoided. A vice in the representation, like an error in the first concoction, must be followed by disease, convulsions, and finally death itself."

The recent struggle on the tariff, in which a handful of purchased Senators were able to defeat the suffrage of the nation, the House of Representatives, the Executive, and the majority of their own chamber—the whole nation—reproduces a picture of the scene when the Senate was founded. It has also revealed the fact that there must be a death, as Wilson predicted. Whether it will be that of the nation or of its chief unrepublican feature, remains to be seen. Professor von Holst says that the abolition of the Senate, as now constituted, would necessitate a number of other far-reaching changes in the Constitution: unquestionably; but there is no fear that they will come too fast. Our country is styled a republic, but it is only by courtesy. There has never been a day when this nation was a republic. Towards the close of the Convention Randolph said: "We have, in some revolutions of this plan, made a bold stroke for Monarchy. We are now doing the same for an Aristocracy." Randolph was one of the few lawyers in the Convention who really understood the English Constitution. It is still the case that principles extinct in England live again in its colonies, and in the last century lawyers in America still got their notions of the English Constitution from old law-books. They did not perceive that the House of Lords had already parted with its absolute veto on the Commons, and indeed that superstition about the English Constitution survives. In the American Constitution monarchy was restored with new vigor in the guise of Presidency, and imperial State irresponsibility was established under the impression that it was British "sovereignty," though no such supremacy had existed in Great Britain since *Magna Charta*. The rule of the many by the few was here admitted without those restrictions which had been imposed on Crown and Peer in England by centuries of revolution and evolution. The English people are naturally aghast that we should submit to the imposition of taxes by a chamber in which our people

are not represented. The new tariff itself is of small moment compared with the political conditions illustrated in its enactment. These are of such significance, in connexion with the question of senatorial reform, that I call further attention to them.

A particularly notable number of *The Federalist* is 62. It was no doubt written by Hamilton (though by some ascribed to Madison). He expresses a hope that the senatorial system may work better than many contemplated. But (and to this I ask attention) the only check on the supremacy of small States is this: "*The larger States will always be able by their power over the supplies to defeat unreasonable exertions of this prerogative of the lesser States.*" Even in the act of advocating ratification of the Constitution Hamilton's candor admits that it introduces the principle of "PREROGATIVE," requiring a check similar to royal prerogative in England. When the second chamber was first constituted by the Convention, and while it remained as yet republican in basis, equal power of originating all bills was given it; but when it was made a peerage of States, the small States offered, as a concession, that the Senate should relinquish all power over the purse, in imitation of the British Constitution. This concession was receded from, but by the persistent efforts of Edmund Randolph it was recovered,—or supposed to be. The struggle was over the right to originate money bills; the second clause (Art. I. Sec. 7) "but the Senate may propose or concur with amendments, as on other bills" excited no suspicion. It passed *nem. con.*, which must have been impossible had it been supposed that the Senate would ever assert such power over the national purse as that with which we are unhappily familiar. The sentence in *The Federalist*, No. 62, is an authentic witness that Hamilton understood the exclusive power of the Representatives over supplies to be genuine, and intended to balance senatorial prerogative.

During the recent combat on the tariff, the New York *Evening Post*, whose legal opinions justly carry weight, contained the following editorial paragraph:

"Our constitutional provision on the control of the House over money-bills was confusedly drawn from English practice, and what that practice is was pretty

conclusively shown the other day in the action in the House of Lords on the budget. Some of its features were extremely distasteful to the Tory peers, and Lord Salisbury made an elaborate argument to show that the House of Lords had a constitutional right to amend a revenue bill. Lord Rosebery replied briefly and rather contemptuously that the only thing the House of Lords had to do with a money-bill was to take it as it came from the House of Commons, and this the noble lords proceeded to do meekly enough, despite all their wry faces. That essentially this absolute control of the power of the purse was intended to be given the House by the framers of the Constitution is beyond question. They never could have contemplated the possibility of the Senate's making what is practically a new bill under cover of the right to 'propose or concur with amendments.'"

In moving the question in the Convention Randolph said:

"First, that he had not wished for this privilege, whilst a proportional representation in the Senate was in contemplation; but since an equality had been fixed in that House, the large States would require this compensation at least. Secondly, that it would make the plan more acceptable to the people, because they will consider the Senate as the more aristocratic body, and will expect that the usual guards against its influence will be provided, according to the example of Great Britain. Thirdly, the privilege will give some advantage to the House of Representatives, if it extends to the originating only; but still more if it restrains the Senate from amending." (*Madison Papers*, III, p. 1297.)

But why did the Convention allow the Senate to amend money bills at all? It was on an admonition of Justice Wilson, a champion of just representation:

"The House of Representatives will insert other things in money bills, and by making them the conditions of each other destroy the deliberate liberty of the Senate. He (Wilson) stated the case of a preamble to a money bill sent up by the House of Commons, in the reign of Queen Anne, to the House of Lords, in which the conduct of the misplaced Ministry, who were to be impeached before the Lords, was condemned; the Commons thus extorting a premature judgment without any hearing of the parties to be tried; and the House of Lords being thus reduced to the poor and disgraceful expedient of opposing, to the authority of the law, a protest on their Journals against its being drawn into precedent."

With this reason for the Senate's right to propose amendments objections to it were met in ratifying Conventions. This is what the people voted for and adopted, and it is what never could have been unanimously offered them had it been imagined by the framers that the power of the Senate would ever be used on the purse itself, or for any other purpose than to restrain the representatives from

escaping the senatorial check on measures not pecuniary, by making them "riders" to money bills. The Senate has therefore long been exercising an unconstitutional authority in amending money bills pure and simple, and we are at this moment under a system of taxation really originated by the Senate.

Before me is a manuscript of Edmund Randolph, our first Attorney-General, in which he says concerning the Constitution, "Many powers were vaguely granted without regard to accuracy in their nature, and uncircumscribed in their extent. Whether this indefinite feature was the effect of accident or design has been and still is a subject of controversy." Justice Wilson, while persuading Pennsylvania to ratify, admitted that "in this system the distinction and independence of power is not adhered to with entire theoretical precision;" and he alluded especially to a degree of inaccuracy in defining the powers of the Senate. Now it is notable in our constitutional history that wherever there has been any such vagueness, the Senate has steadily appropriated the power involved. This process began at an early date, in the contest concerning the British Treaty, in 1795. The treaty was ratified by the Senate, though its opponents in that body represented a large majority of the people, and was signed by the President against the advice of his most eminent friends—Jefferson, Randolph, Madison, Hamilton, and others. The ratification of this treaty, virtually violating our treaty with France, by whose alliance independence was won, was felt by the people's representatives as an outrage, especially as at that moment English cruisers were seizing provisions on American ships. The House of Representatives, now required to make appropriations for carrying the treaty into effect, considered that the occasion had arrived for using, in the language of *The Federalist*, No. 62, "their power over the supplies to defeat unreasonable exertions of this prerogative of the lesser States." After long debate the House sent to the President a respectful request, moved by Mr. Livingston, for such papers concerning the treaty as it might not be injurious to pending negotations to disclose, the resolution passing by 62 to 37. The President refused, in a message of which Madison wrote to Jefferson, April 4, 1796, "The absolute refusal was as unexpected as the

tone and tenor of the message are improper and indelicate." The President says, "It is perfectly clear to my understanding that the assent of the House of Representatives is not necessary to the validity of a treaty;" but its assent was necessary to supply money for carrying it into effect.[1] The message was felt as the menace of a *coup d'état*, and the intimidated House surrendered. Such was the end of the first effort of the people's representatives to check a senatorial "prerogative" by their control over the "supplies."

The point so clear to the President, who was no lawyer, is one of extreme intricacy. During the discussion Chief Justice Ellsworth wrote an opinion that the papers could not be constitutionally demanded by the House, but that small-State enthusiast of the Convention holds a very small place in the annals of jurisprudence beside such men as Justice Wilson, Edmund Randolph (our first Attorney General), Jefferson, and Madison. Wilson said, in advocating a ratification of the Constitution by Pennsylvania:

"It well deserves to be remarked, that though the House of Representatives possess no active part in making treaties, yet their legislative authority will be found to have strong restraining influence upon both President and Senate. In England, if the King and his Ministers find themselves, during their negotiations, to be embarrassed, because an existing law is not repealed, or a new law is not enacted, they give notice to the legislature of their situation, and inform them that it will be necessary, before the treaty can operate, that some law be repealed, or some be made. And will not the same thing take place here?"

Jefferson wrote to Senator Giles, December 31, 1795:

"Randolph seems to have hit upon the true theory of our Constitution, that when a treaty is made involving matters confided by the Constitution to the three branches of the Government conjointly, the Representatives are as free as the President and the Senate were to consider whether the national interest requires their giving the form and force to the articles over which they have a power."

The House of Representatives having then allowed itself to be

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[1] The only ground on which the House of Representatives had been denied by the Convention equal right over treaties was that such negotiations might require a secrecy inconsistent with their discussion in so large a body. (*Madison Papers*, iii, p. 1518.) There was no suggestion by any speaker that the Representatives might be bound to make appropriations for treaties, otherwise the clause, which had but one opposing vote (Pennsylvania), could never have passed.

browbeaten, it still remains undetermined whether a chamber not chosen by the people in conjunction with a President (often elected by a minority,—as Hayes, Harrison, and others have been) may not by treaty alienate the most important rights of the nation.

I am no worshipper of majorities. Wisdom is generally in the minority, but it is a minority of superior thought, intelligence, and character, which has fair chance to become a majority on any question proposed. Had our century of national experience shown that the representatives of Statehood were normally superior to the representatives of the people, or that our system, however wrong theoretically, worked well for the true welfare of the nation, my criticisms might be fairly regarded as merely academic. But the reverse appears to me the fact. That the prestige of the Senate has attracted to it more men of talent than reach the House may be admitted, but it has also attracted more self-seekers and mere plutocrats, who purchase places therein for which they are not fit. Moreover, talent, if devoted to reactionary aims, or personal ambition, is a worse enemy than stupidity. Fifty years ago, when the Senate was at its height of talent, its ablest men were cleverly defeating every effort of the nation's Representatives to restrain Slavery. We old abolitionists have long memories. I have heard the eloquence of Clay and Webster in the Senate, and was there when those famous orators, and their committee, in order to open to Slavery territories of which Mexico had been robbed, suggested the bribe which corrupted the first "Free Soil" House of Representatives. I do not suppose that more talent was ever displayed by a public body than in that infamy.[1] From the action of the Senate in 1850 came the struggles

[1] The Senate's proposal to organise all the territories "acquired" (robbed) from Mexico, except California, without restriction on the extension of Slavery into them, contained a cunning clause granting Texas money. The bait caught the House. After voting against the proposal by a majority of eight, it reconsidered, and passed it by a majority, with a "rider," paying Texas ten millions of stock redeemable in fourteen years, bearing five per cent. interest, payable half-yearly at the National Treasury. The public debt of Texas, largely held by members of Congress, suddenly rose from between twenty and thirty per cent. to par. "Corruption," says Greeley, "thinly disguised, haunted the purlieus and stalked through the halls of the Capitol; and numbers, hitherto in needy circumstances, suddenly found themselves rich." (*The American Conflict*, Vol. I, p. 208.)

in Kansas and ultimately the great civil war. During the entire anti-slavery struggle the Senate, instead of being that proverbial "saucer" in which legislation is cooled, was the arena of "fire-eaters," a place for the exchange of affronts, where debate proceeded under continual threats—not unlike those in the Convention which established the Senate—of breaking up the Union unless certain States had their sovereign privilege of extending Slavery throughout the national territory. If any one wishes to know whether the Senate has improved since then, let him read the terrible arraignments of that body by Professor von Holst in *The Forum* of November, 1893, and his oration printed in *The Monist* of October, 1894.

I have felt it necessary to tell something of the humiliating history of the origin and career of the Senate because it is only by such light that wise reform can be begun. There has been something like a patriotic conspiracy among historians to suppress the facts, which are buried in records long out of print. Here is ex-senator Edmunds writing in a recent *Forum* about the Founders:

> "They believed that the liberty and happiness of the people of the several States—States which they foresaw would finally embrace a continent in their benign sway—could only be preserved by such divisions and subdivisions, the sources and methods and exercise of political power as they adopted and provided for. A century of experience has demonstrated the wisdom of their marvellous plan."

The Founders' own words, cited above, proved that they believed nothing of the kind; that a large majority of them, and all of their really great men, accepted the plan against their judgment, with infinite disgust, under treasonable menaces of unpatriotic men; that they foresaw many of the evils which a "century of experience" has illustrated, confronting us this day with the fact that we are under the tyranny of a Prerogative less responsible and more liable to corruption than that which our Revolution overthrew.

I weigh again the words, and let them stand. In a letter to Lord North (February 5, 1778) George the Third wrote: "Lord George Germaine said to me this day that the Declaratory Act, though but waste paper, was what galled them [the Americans] most." This was true. Of that Declaratory Act (February, 1766) Thomas Paine wrote: "One of the greatest degrees of sentimental

union which America ever knew, was in denying the right of the British Parliament 'to bind the colonies in all cases whatsoever.' Taxation was nothing more than putting the declared right in practice." Parliament was an elective body, but America was not represented in it. Nor are the people of the United States represented in the Senate, which is able "to bind them in all cases whatsoever," and has just bound them with a system of taxation against which their Representatives and their President protested. But it was not the case in the British Parliament that its measures concerning America could be controlled by the ability of two or three easily bribed men to overrule both Crown and Parliament, by an obstructive power derived from the superstitious awe of the "prerogative" of those anointed by State sovereignty. The fact that colonies fresh from a seven years' revolution against vassalage could subject this nation to an assembly irresponsible to it, and not even able to carry into effect its own will against a clique—a little Senate, *imperium in imperio*—reminds us once more that real reforms are not secured by revolutions. Were the Senate uprooted to-morrow something almost as bad might possibly be planted next day.

And all sudden and sweeping changes partake of the nature of revolution. Thorough, permanent, and beneficent reforms must come by intelligent and purposed evolution. Natural selection breeds wolf and lamb impartially; human selection alone assures survival of the humanly fittest. Where a nation is largely enlightened, and its leading minds deeply occupied with national affairs, freedom and progress may be developed even by means of unpromising governmental anachronisms. Out of the irrational hereditary principle of the English Crown, carrying it sometimes to infancy and incompetency, Ministerial Government, at first a necessity, was developed into the only real Crown. The Lords, reduced to feebleness by the advance of democracy, have been turned to a really democratic purpose by English good sense, their House being practically the means of securing to the people their right to determine the measures by which they shall be governed. A party in the House of Commons lately passed a revolutionary measure by a majority hardly equal to the number of Ministers (who vote under

dictation),—a measure that was studiously kept secret before the elections. The Lords returned the measure, with a demand that it should be submitted to the people. It being probable that the people would defeat it, the measure has been necessarily relinquished. The anger of the defeated has been seized on by a parliamentary faction to revive the old siege against the House of Lords, but with no prospect of success. Formerly the existence of that House was assailed by radicalism with the hope of replacing it with a Senate, but since then our State Peerage has become a by-word to the world. Europe has just seen simultaneously the Great Exposition of our Civilisation at Chicago, and the Great Exposure of our Constitution at Washington. England will have no such thing. But sagacious men like Lord Rosebery perceive in the outcry an opportunity for developing the House of Lords another stage. By taking from it a fictitious veto, one it never ventures to exercise against a measure passed on by the people, its real suspensive veto may be definitely adapted to the new national needs and the conditions of party government.[1] England will then have a House independent of party interests and passions, not controlled by the *aura popularis*,—not subject to the transient fads, isms, and agitations which candidates must conciliate,—able to check either party in power by compelling it to consult the nation on important issues, and able to obtain from the people their maturer judgment. It is probable that the House of Lords, theoretically absurd, will come out of the present agitation the most useful second chamber in the world.

[1] A good many Americans seem to suppose that the repeated rejection by the Lords of the bill for "marriage with a deceased wife's sister" represents their claim to an absolute veto. Such is not the fact. Whenever the Commons have received back that bill from the Lords, they (the Commons) have accepted the decision without sending that particular bill again to the Lords. Had the Commons really cared for the bill at any session, and insisted on it, the Lords must certainly either have passed it or demanded a popular vote on the measure. The exceptional action of Parliament on this reasonable Bill is explicable by the fact that the Commons do not really like it, that it has never made part of any party's programme at the polls, and would probably be defeated by the people. It is desired by but few, and mainly royal personages. Its rejection in different sessions, the Commons not insisting on it, does not affect the fact that the House of Lords has not within this century practically asserted a right of absolute veto.

But whatever may be the fate of the House of Lords, it appears to me certain that, in the direction of its proposed reform, our Senate is to be altered as the first step. To deprive it of its power of absolute veto could not practically affect the internal interests of any State unfavorably. It would at once render the Senate less liable to perversion by the large interests which can now purchase the balance of power in so small a body. Votes that can merely suspend a measure are hardly marketable. And although it may be hoped that other organic changes will follow, (not, I trust, election of Senators by the people instead of Legislatures, which would but give a sham popular sanction to a fundamental wrong,) even if the Senators continue to be chosen as now, deprivation of their power to defeat measures permanently by brute force would probably draw to their assembly better men. When there is a chamber at Washington whose only weapons are argument, reason, knowledge, eloquence, we shall perhaps no longer suffer by the unwillingness of our thinkers and scholars to take part in those miserable combats for which their finest qualities constitute their unfitness, and in which their very virtues insure defeat.

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